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OF THE

United States

OCTOBER TERM, 1976

No. 76-1869

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO;
AND
THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,
Petitioners,

VS.

GREYHOUND LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioners,

VS.

GREYHOUND LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals, upon remand from this Court, reversed its earlier decision and held that the district court had improperly granted an injunction

to preserve the status quo pending arbitration of a labor dispute.

OPINIONS BELOW

The opinion of the district court (Appendix A, *infra,* pp. i-xii) is neither officially nor unofficially reported. The original opinion of the court of appeals (Appendix B, *infra,* pp. xiii-xxv) is officially reported at 529 F.2d 1073. The order by this Court vacating the judgment and remanding the case (Appendix C, *infra,* p. xxvi) is unofficially reported at 50 L.Ed.2d 68. The opinion of the court of appeals after remand (Appendix D, *infra,* pp. xxvii-xxx) is officially reported at 550 F.2d 1237.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977. Pursuant to 28 U.S.C. section 1254 (1), this Court has jurisdiction to review that judgment by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

This petition seeks review of a judgment, by the United States Court of Appeals for the Ninth Circuit, which reversed the issuance of a preliminary injunction. The injunction ordered the employer to preserve the status quo pending arbitration of a dispute with the union. The injunction issued after a hearing and a finding that the unilateral changes in

working conditions, which the employer sought to implement, would cause irreparable injury to the employees represented by the union. Review by this Court is necessary to settle an important question of federal labor law: the relationship between the strong Congressional policy in favor of labor arbitration and the anti-injunction provisions of the Norris-LaGuardia Act. Review is also necessary to define the parameters of this Court's decision in *Buffalo Forge v. United Steelworkers of America,* 428 U.S. 397 (1976), and to resolve a conflict that now exists between the circuits over the interpretation of that decision and the power of federal district courts to issue injunctions against employers to preserve the status quo pending arbitration.

The specific questions raised by this petition are:

1. Does the Norris-LaGuardia Act, which prohibits certain injunctions against *unions,* limit the jurisdiction of the federal courts to issue injunctions against *employers* to preserve the status quo pending arbitration? Underlying the Ninth Circuit's decision in this case is the assumption that the Norris-LaGuardia Act has such a limiting effect. A contrary assumption underlies the Fourth Circuit's ruling in *Lever Bros. Co. v. International Chem. Workers Union, Local 217,* ..... F.2d ....., 95 LRRM 2438 (1977).

2. Does this Court's decision in *Buffalo Forge,* which held that an injunction could not issue against a *union* participating in a sympathy strike over a *non-arbitrable dispute,* limit the power of a federal

court to issue an injunction against an *employer* to preserve the status quo pending resolution of an *arbitrable dispute?* The Ninth Circuit has said yes; the Fourth Circuit has said no.

STATUTES INVOLVED

The statutes involved in this petition are sections 1 and 4 of the Norris-La-Guardia Act, 29 U.S.C. §§101 and 104; and section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a). The text of those sections is set forth in Appendix E, pp. xxxi-xxxii.

STATEMENT OF CASE

This action was brought in the United States District Court for the Northern District of California, pursuant to section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185 ("section 301"). Jurisdiction in the district court was based upon section 301 and upon 28 U.S.C §1337.

Plaintiffs in the district court (and petitioners before this Court) were Amalgamated Transit Union, Division 1384, AFL-CIO, which represents Greyhound bus drivers in the Vancouver-Portland area, and the Amalgamated Council of Greyhound Divisions, AFL-CIO, which is comprised of numerous local divisions, including Division 1384, and represents all Greyhound drivers. Division 1384 and the Council are both labor organizations within the meaning of section 2(5) of the National Labor Relations Act, 29 U.S.C.§152(5), and are referred to collectively in this petition as the "Union."

Defendant in the district court (and respondent before this Court) was Greyhound Lines, Inc. ("Greyhound" or "the Company"). It is a national corporation and an employer in an industry affecting commerce within the meaning of sections 2(2) and 2(7) of the National Labor Relations Act, 29 U.S.C. §§152(2), (7).

The underlying dispute, which led to the action in the district court, was Greyhound's unexpected announcement in April, 1975, that it intended, unilaterally, to change certain work cycles for its drivers, which had been in effect for fifteen years. The Union protested the projected changes and requested expidited arbitration of the dispute, so that an arbitrator's ruling could be rendered prior to the announced date of the changes.

In return for its willingness to expedite the arbitration process, the Union asked Greyhound to refrain from implementing the proposed changes until an arbitrator ruled on their propriety. The Union requested maintenance of the status quo because implementation of the changes, prior to an arbitrator's award, would inflict irreparable harm on certain of the Company's drivers.

Despite the fact that the Company had been considering a change in the work cycle for a year or two, it refused to delay implementation of the change until an arbitrator could consider the dispute. Greyhound

offered no reason for its refusal, other than an assertion that "the company acts and [the union] reacts." To add insult to injury, Greyhound refused to agree to expedited arbitration, even without maintenance of the status quo.

Faced with these refusals, and the irreparable harm its members would suffer if the work cycles were changed pending arbitration, the Union filed an action in the United States District Court for the Northern District of California seeking an injunction to preserve the status quo until an arbitrator could resolve the contractual dispute. On June 17, 1975, an evidentiary hearing was held on the Union's application for a preliminary injunction. Two days later, the case was argued, and the following day an order was issued granting a preliminary injunction prohibiting Greyhound from "implementing the proposed changes in the present weekly cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement." (Appendix A, p. 10.) The court issued the injunction because it found that: (1) without going into the merits, it was evident that the Union's position was not frivolous (Appendix A, p. 6); (2) not enjoining Greyhound from inplementing the scheduled changes pending arbitration would harm the Union more than issuing the injunction would harm the Company (Appendix A, p. 9); and (3) the Union would suffer irreparable harm unless the injunction were issued. Appendix A, p. 9.)

Greyhound appealed to the Ninth Circuit, which specifically affirmed the finding of irreparable harm

and unanimously affirmed the issuance of the injunction. The Company then filed a petition for writ of certiorari. While the petition was pending, this Court issued its opinion in *Buffalo Forge,* and both parties filed supplemental briefs discussing the relevance of that case to the present one.

On October 4, 1976, Greyhound's petition was granted. The judgment of the Ninth Circuit was vacated and the case was remanded to permit the court of appeals to consider the applicability of *Buffalo Forge*. On April 1, 1977, the Ninth Circuit reversed the district court on the ground that the injunction to preserve the status quo pending arbitration had been improperly granted in light of *Buffalo Forge*.[1]

REASONS FOR GRANTING THE WRIT

I

INTRODUCTION

For the past twenty years, this Court has consistently ruled that the federal judiciary may exercise its equitable powers in furtherance of the strong Congressional policy which favors the peaceful settle-

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[1]The Company's petition for a writ of certiorari was filed after the arbitration award had been rendered and after the preliminary injunction had, by its own terms, expired. The Union argued that the petition should not be granted because the case was moot. The petition was granted, however, and, on remand, the Ninth Circuit specifically ruled that the case was not moot because "the underlying dispute between the parties is 'one capable of repetition yet evading review.'" (Appendix D, p. xxviii.) Accord, *Pressmen's Union v. Pittsburgh Press Co.,* 479 F.2d 607, 609 n.1 (3d Cir. 1973).

ment of labor disputes through arbitration. See *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.,* 353 U.S. 30 (1957).

> "[T]he very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockout, *or other self-help measures.* This basic purpose is largely undercut if there is no immediate, effective remedy for these very tactics that arbitration is designed to obviate." *Boys Markets v. Retail Clerks,* 398 U.S. 235, 242 (1970). [Emphasis added.]

This Court has held that, despite the provisions of the Norris-LaGuardia Act, which seem absolutely to prohibit injunctions against unions, federal district courts do, nevertheless, have jurisdiction to enjoin strikes over certain disputes. *Boys Markets v. Retail Clerks, supra.* If a dispute is arbitrable under a collective bargaining agreement, a union may not engage in self-help, in the form of a strike, even though the agreement does not contain a no-strike clause. *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368 (1974). Similarly, an employer should not be allowed to engage in self-help by instituting disputed changes in working conditions before an arbitrator can rule on them; and, in fact, the district courts have consistently issued injunctions against employers when the dispute was arbitrable, and the change in question would have produced irreparable harm pending arbitration, thereby depriving the union of the benefit it obtained when it agreed to arbitrate rather than

strike. See, e.g., *Local 1098 v. Eastern Greyhound Lines,* 225 F.Supp. 28 (D. D.C. 1963).[2]

Thus, the courts have developed a mutuality of equitable remedies designed to encourage unions and employers to settle their contractual disputes through arbitration, rather than through self-help. This mutuality of injunctive relief, which is essential to the arbitration process, is destroyed by the Ninth Circuit's revised opinion. District courts can continue to enjoin unions from engaging in self-help over arbitrable disputes, despite the absence of explicit no-strike agreements; but, according to the Ninth Circuit's decision, district courts cannot enjoin self-help by employers, in the form of unilateral changes in working conditions, unless the employer has explicitly promised to preserve the status quo pending arbitration. The ruling by the Ninth Circuit is based on a reading of *Buffalo Forge* which has subsequently been rejected by the Fourth Circuit, thereby creating a conflict between the circuits. That conflict should be resolved, and the parameters of the *Buffalo Forge* decision defined.

The issue presented by this petition is whether federal district courts can preserve the status quo,

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[2]As the district courts have noted, an action to preserve the status quo pending arbitration is really an action, as in *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1953), to specifically enforce an arbitration clause. *Local 1098 v. Eastern Greyhound Lines, supra.* "If the court has the power to order specific performance of a contract covenant to arbitrate, it has the collateral power to take steps that would prevent rendering the result of the arbitration futile and ineffective." *Local 757 v. Budd Co.,* 345 F.Supp. 42, 47 (E.D. Pa. 1972).

pending arbitration, by enjoining employers from instituting those unilateral changes in working conditions *which would produce irreparable harm* before an arbitrator could rule on their legality. The continued use of arbitration, as the preferred method for settling labor disputes, may well turn on the resolution of that issue. Just as employers would be reluctant to agree to arbitration if unions could inflict irreparable harm by striking over a dispute before an arbitrator could rule, so too will unions be reluctant to enter into arbitration agreements if employers can inflict irreparable harm by taking unilateral action pending arbitration. Unless the federal judiciary can enjoin any form of self-help that will produce irreparable harm before an underlying dispute can be arbitrated, economic muscle may replace arbitration as the means for settling such disagreements.

II

THE NORRIS-LaGUARDIA ACT DOES NOT LIMIT THE JURISDICTION OF THE FEDERAL DISTRICT COURTS TO ISSUE INJUNCTIONS AGAINST EMPLOYERS TO PRESERVE THE STATUS QUO PENDING ARBITRATION.

On remand from this Court, the Ninth Circuit asked the parties to file supplemental briefs addressed to the following question:

> "Does *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970), as interpreted by *Buffalo Forge Co., supra,* authorize an injunction to preserve the status quo work cycle pending arbitration in the absence of an agreement by Greybound to so preserve the status quo pending arbitration?"

The wording of the question reveals the Ninth Circuit's misconception of the issue before it. Implicit in the question are two assumptions: (1) that the authority for issuing an injunction against an employer, to preserve the status quo pending arbitration, flows from this Court's decision in *Boys Markets,* and (2) that an injunction ordering an employer not to alter working conditions pending arbitration cannot be issued unless the employer has explicitly promised to preserve the status quo. For the reasons set forth below, both of those assumptions are incorrect.

In order to understand why the first assumption is wrong, it is necessary to examine the Norris-LaGuardia Act and the *Boys Markets* opinion. Prior to 1932, the federal courts frequently abused their equitable powers by issuing, at the request of employers, *ex parte* restraining orders against labor union activities. Those injunctions were summarily issued on the basis of the employer's unsupported affidavits, with no opportunity afforded the union to cross-examine witnesses or to present evidence. The orders were generally written in vague, sweeping language and were designed to enjoin large numbers of people from participating in a broad range of activities. See generally F. Frankfurter & N. Greene, *The Labor Injunction* (1930); *Boys Markets v. Retail Clerks, supra,* 398 U.S. at 250.

In response to this situation, Congress passed the Norris-LaGuardia Act (29 U.S.C. §§101-115), "to cor-

rect the abuses that had resulted from the interjection of the Federal judiciary into union-management disputes *on behalf of management." Boys Markets v. Retail Clerks, supra,* 398 U.S. at 251. [Emphasis added.] See *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co., supra,* 353 U.S. at 40. Section 2 of the Act (29 U.S.C. §102), entitled "Public Policy in Labor Matters Declared," states unequivocally that the statute was passed so that the individual worker could be "free from the interference, restraint, or coercion of employers of labor, or their agents . . . in [the] self-organization or in other concerted activities [by workers] for the purpose of collective bargaining or other mutual aid or protection."

In order to accomplish this objective, the Act afforded workers certain protections. Section 1 (29 U.S.C. §101) removed jurisdiction from the federal courts to issue injunctions "in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter." Section 7 (29 U.S.C. §107) sets forth the procedures for issuing injunctions, while section 4 (29 U.S.C. §104) rendered certain activities *by unions and employees* totally immune from equitable restraints. See Appendix E. No specific acts by employers, however, were granted such immunity.

> [The] history and the language of the [Norris-LaGuardia] Act . . . [indicate] that the purpose of Congress . . . was to protect only employees and unions. . . . [N]othing in the statement of policy . . . indicate[s] any intention to deny jurisdiction to issue injunctions against employers." *Brotherhood of Locomotive Engineers v. B & O R.R. Co.,* 310 F.2d 513, 518 (7th Cir. 1962).
>
> Accord: *De Arroyo v. Sindicato de Trabajadores Packinghouse,* 425 F.2d 281, 291 (1st Cir.) cert. den., 400 U.S. 877 (1970);
> *Westchester Lodge 2186 v. Railway Express Agency Inc.,* 329 F.2d 748, 753 (2d Cir. 1964);
> *Milk and Ice Cream Drivers, Local 98 v. Gillespie Milk Prods. Corp.,* 203 F.2d 650 (6th Cir. 1953);
> *Bateman v. South Carolina State Ports Auth.,* 298 F.Supp. 999 (D. S.C. 1969);
> *Local 238 v. Armour & Co.,* 294 F.Supp. 168 (W.D. Mich. 1968);
> *Textile Workers v. Aleo Mfg. Co..,* 94 F.Supp. 626, 629 (M.D. N.C. 1950).

Boys Markets involved an attempt by an employer to enjoin a strike by a union, despite specific language in section 4(a) of Norris-LaGuardia depriving the federal courts of jurisdiction, in labor disputes, to issue any injunction which prohibits a person from "ceasing or refusing to perform any work or to remain in any relation of employment." 29 U.S.C. §104(a). The issue before this Court was whether:

> "the anti-injunction provisions of the Norris-LaGuardia Act preclude a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agree-

ment, even though that agreement contains certain provisions enforceable under §301(a) . . . for binding arbitration of the grievance dispute concerning which the strike was called." 398 U.S. at 237-38.

This Court held that the "literal terms of §4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of §301(a) . . . and the purposes of arbitration." 398 U.S. at 250. Such an accommodation was required because "the effectiveness of . . . [arbitration] agreements would be greatly reduced if injunctive relief were withheld." 398 U.S. at 249. The accommodation worked out by the Court, and subsequently referred to as the *Boys Markets* exception to Norris-LaGuardia, is a "narrow one" which allows the issuance of an injunction only in situations "in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure" and the "strike sought to be enjoined . . . is over a grievance which both parties are contractually bound to arbitrate." 398 U.S. at 253-54. See *Buffalo Forge v. Steelworkers, supra,* 428 U.S. at 406.

The present case did not present the Ninth Circuit with a *Boys Markets* issue because it did not involve an accommodation between the Congressional policy in favor of arbitration and the provisions of Norris-LaGuardia. As discussed above, section 4 of that Act does not prohibit injunctions against employers. District courts, therefore, can order employers to preserve the status quo pending arbitration because "the

failure [to preserve the status quo] was not part and parcel of the abuses against which the Act was aimed." *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 458 (1957).[3] As the Ninth Circuit itself had earlier stated:

> "[I]f [the] conduct sought to be compelled does not fall within the 'specific provisions' of Norris-LaGuardia, but the suit does fall within section 301, then Norris-LaGuardia does not apply to the suit at all." *Retail Clerks Union Local 1222 v. Alfred M. Lewis, Inc.,* 327 F.2d 442, 448 (9th Cir. 1964).

That is precisely the situation presented by this case. Therefore, the Ninth Circuit was wrong when it assumed that the Norris-LaGuardia Act applied and that the district court's jurisdiction to issue an injunction was dependent upon the *Boys Markets* exception to that Act.

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[3]See, e.g., *Westchester Lodge 2186 v. Railway Express Agency, Inc.,* 329 F.2d 748, 752-53 (2d Cir. 1964); *Southern Ry. Co. v. Brotherhood of Locomotive Firemen,* 337 F.2d 127, 133 (D.C. Cir. 1964); *United Steelworkers v. Blaw-Knox Foundry,* 319 F.Supp. 636, 640 (W.D. Pa. 1970). As one court noted:

> "It is an ironical thing in a way for an employer to object to the granting of an injunction at the behest of a labor union as being in contravention of the Norris-LaGuardia Act. The Norris-LaGuardia Act, as is well known, was passed to prevent injunctions being granted at the behest of employers against labor unions or employees generally." *Local 1098 v. Eastern Greyhound Lines, supra,* 225 F.Supp. at 31.

III

THE BUFFALO FORGE DECISION DOES NOT RESTRICT THE POWER OF A DISTRICT COURT TO ENJOIN AN EMPLOYER FROM ALTERING THE STATUS QUO PENDING ARBITRATION WHEN THE EMPLOYER'S PROPOSED ACTIONS ARE ARBITRABLE.

Since Norris-LaGuardia does not prohibit enjoining an employer to preserve the status quo pending arbitration, a district court can order such relief pursuant to its inherent equitable power to prevent irreparable harm, and in aid of its jurisdiction under section 301(a) to protect and to promote the Congressional policy which favors the peaceful settlement of labor disputes through arbitration. In deciding whether to issue injunctive relief, a district court must first determine whether it has jurisdiction under section 301(a). Jurisdiction is established if the underlying dispute is arbitrable pursuant to the terms of a collective bargaining agreement. See *Boys Markets v. Retail Clerks, supra,* 398 U.S. at 254.

If the dispute is arbitrable, the court must next determine whether an injunction is necessary because the action proposed by the employer would have "the purpose [or] effect of . . . depriving [the union] of [its] bargain." *Buffalo Forge v. Steelworkers, supra,* 428 U.S. at 408. The bargain in question is the promise by both parties to arbitrate their contractual disputes and to refrain from engaging in self-help measures that would produce irreparable harm pending arbitration. In deciding whether an injunction is necessary to prevent a union from being deprived of its bargain pursuant to such an agreement, a district court must

apply ordinary principles of equity and determine (1) whether the unilateral changes proposed by the employer would result in irreparable harm pending arbitration, and (2) whether not issuing an injunction pending arbitration would harm the union and its members more than issuing such relief would harm the employer.[4]

In the present case, the district court found that the underlying dispute was arbitrable; that the proposed changes would produce irreparable harm; and that not enjoining Greyhound would harm the Union's members more than issuing the injunction would harm Greyhound. The court of appeals affirmed those findings. An injunction to preserve the status quo pending arbitration was, therefore, necessary and proper to prevent the Union from being deprived of its bargain, and the Ninth Circuit correctly affirmed the injunction in its first opinion.

On remand, however, relying upon *Buffalo Forge,* the court of appeals ruled that the Union was required to make an additional showing in order for an injunction to issue. According to the Ninth Circuit, it was necessary for the Union to demonstrate that

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[4]The original decision of the Ninth Circuit in this case, and the decision by the Fourth Circuit in *Lever Bros. Co. v. International Chem. Workers Union, Local 217, supra,* both hold that a union may obtain an injunction, to preserve the status quo pending arbitration, without demonstrating that it is likely to succeed on the merits of the dispute at arbitration. The union need only show that its position is sufficiently sound to prevent the arbitration from being a futile endeavor. The Second Circuit has held that the union must demonstrate only that its claim is not "plainly without merit." *Hoh v. Pepsico,* 491 F.2d 556 (2d Cir. 1974).

Greyhound had promised not to alter the status quo pending arbitration. Since the collective bargaining agreement contained no such promise, the court of appeals held that the injunction had been improperly granted.

This second ruling by the Ninth Circuit was incorrect because it confused two different promises. The first is the promise to arbitrate the underlying dispute. That promise must be explicit in the collective bargaining agreement in order for a district court to have jurisdiction under section 301(a). It was the lack of that promise in *Buffalo Forge* which led this Court to rule that an injunction could not issue. The second promise is to refrain from any self-help, pending arbitration, that would produce irreparable harm and thereby deprive the other party of the benefit it expected to receive by agreeing to arbitrate. That promise is implicit whenever two parties agree to settle their disputes through arbitration, rather than by force.

The Ninth Circuit's confusion resulted from its faulty assumption, discussed above, that this was a *Boys Markets* case. Because of that assumption, the court of appeals read *Buffalo Forge* much too broadly and applied it in a manner never intended by this Court.[5] A review of the facts in *Buffalo Forge* makes this evident.

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[5]Two other courts have properly interpreted the holding in *Buffalo Forge* as being a "narrow" one. See *Republic Steel Corp. v. United Mine Workers*, 428 F.Supp. 637, 640 (W.D. Pa. 1977); *Communication Workers of America v. Western Elec. Co., Inc.*, ... F.Supp. ....., 95 LRRM 2206, 2211 (S.D. N.Y. 1977).

In *Buffalo Forge,* the employer's office clerical-technical (O&T) employees went on strike and picketed during the negotiations for a new collective bargaining agreement. The employer's production and maintenance (P&M) employees, who were represented by the Steelworkers, honored the O&T picket lines and stopped work in support of their sister unions which represented the O&T employees.

The employer then filed a section 301 action alleging that, under the grievance procedure contained in the collective bargaining agreement it had with the Steelworkers, it was entitled to arbitrate the question of whether the sympathy strike violated the contract's no-strike provision. The company asked that the strike be enjoined pending arbitration of that issue.

The district court and court of appeals refused to enjoin the strike. This Court affirmed because the underlying dispute, which led to the strike, was not subject to the arbitration provisions of the collective bargaining agreement.

> "Contrary to the Court of Appeals, the employer claims that despite the Norris-LaGuardia Act's ban on federal-court injunctions in labor disputes the District Court was empowered to enjoin the strike by §301 of the Labor Management Relations Act as construed by *Boys Markets v. Retail Clerks Union, supra. This would undoubtedly have been the case had the strike been precipitated by a dispute between union and management that was subject to binding arbitration under the provisions of the contracts.* In *Boys Markets,* . . . [t]he Court held that the union could be enjoined

from striking *over a dispute which it was bound to arbitrate* at the employer's behest." 428 U.S. at 406. [Emphasis added.]

"*Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that *the strike was not over any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract.* The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; *neither its causes nor the issue underlying it were subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain.*" 428 U.S. at 407-08. [Emphasis added.]

Since the underlying dispute was not arbitrable, the case did not come within the doctrine of *Boys Markets,* and the employer was not entitled to equitable relief because of:

> "the express prohibition of §4(a) of the Norris-LaGuardia Act against injunctions prohibiting any person from '[c]easing or refusing to perform any work or to remain in any relation of employment.' If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of §104." 428 U.S. at 410.

In sum, *Buffalo Forge* dealt only with the first promise discussed above—the promise to arbitrate the underlying dispute—and dealt with that promise in the context of deciding whether the Norris-LaGuardia Act's ban on injunctions against unions should be relaxed. "*Buffalo Forge* does not change existing labor law except to limit injunctive relief against sympathy strikes. . . ." *Republic Steel Corp. v. United Mine Workers,* 428 F.Supp. 637, 641 (W.D. Pa. 1977). "*Buffalo Forge* . . . does no more than decline to apply the *Boys Markets* result to a sympathy strike." *Communication Workers of America v. Western Electric Co.,* ..... F.Supp. ....., 95 LRRM 2206, 2212 (S.D. N.Y. 1977). It declined to do so because a sympathy strike is not *over an arbitrable dispute,* and striking over a non-arbitrable dispute does not "interfere with and frustrate the arbitral process by which the parties had chosen to settle a dispute." *Buffalo Forge v. Steelworkers, supra,* 428 U.S. at 407. Since sympathy strikes do not have this adverse effect on the arbitration process, there is no need to accommodate Norris-LaGuardia with section 301, and the former's ban on injunctions against unions need not be lifted.

This Court was careful to note in *Buffalo Forge* that an injunction would "undoubtedly" have been proper "had the strike been precipitated by a dispute between union and management that was subject to binding arbitration under the provisions of the contracts." 428 U.S. at 406.[6] The Court went on

[6] "'The critical determination in *Gateway* [*Coal* which led to the issuance of an injunction] was that the dispute was arbitrable." 428 U.S. at 408 n.10.

to state that, under section 301, federal courts can use their injunctive power for "the enforcement of . . . arbitration provisions" (428 U.S. at 409), and that the test for issuing injunctions pending arbitration is whether, in the absence of equitable relief, "the arbitration process will be frustrated." 428 U.S. at 412.

The Ninth Circuit failed to apply this test because it mistakenly equated the promise to arbitrate with the promise to refrain from self-help pending arbitration. It reasoned that, since the Union could not be enjoined in *Buffalo Forge* because it had not agreed to arbitrate the underlying dispute, Greyhound could not be enjoined because it had not promised to preserve the status quo. That reasoning ignores the basic difference between the two cases. In *Buffalo Forge,* there was no promise to arbitrate the underlying dispute[7] and, therefore, no need for equitable relief to prevent the arbitration process from being frustrated. In the present case, the underlying dispute was arbitrable and, therefore, equitable relief was proper if Greyhound's actions would have frustrated the arbitration process by denying the Union the benefit it bargained for when it agreed to arbitrate, rather than strike, over contractual disputes.[8]

[7]In *Buffalo Forge,* the underlying dispute was not the sympathy strike, but the failure of the employer and the O&T employees to reach a contract. That underlying dispute was not subject to the arbitration provisions of the contract between the parties to the lawsuit.

[8]In *Communication Workers of America v. Western Electric Co., Inc.,* ..... F.Supp. ....., 95 LRRM 2206 (S.D. N.Y. 1977), the company also argued that, based on *Buffalo Forge,* the district court lacked jurisdiction to preserve the status quo pending arbitration. 95 LRRM at 2208. The court rejected the argument finding that *Buffalo Forge* should be narrowly interpreted because it was simply "a refusal by the Supreme Court to apply the *Boys Markets* exception to the precise facts in *Buffalo Forge.*" 95 LRRM at 2211. Because the dispute in the *Communication Workers* case was over an arbitrable grievance, the district court held that "there is no basis for application of what may be characterized as the 'Buffalo Forge' exception to the 'Boys Markets' exception." 95 LRRM at 2212.

Injunctive relief was necessary and proper in the present case in light of the district court's specific finding, affirmed by the Ninth Circuit, that Greyhound's proposed change in working conditions would produce irreparable harm pending arbitration. Unless the Company were restrained from implementing those changes, the arbitration process would be frustrated because the Union and its members would suffer harm that no arbitration award could later correct. See *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.,* 363 U.S. 528, 534 (1960).

The Ninth Circuit's ruling that there was no basis for finding an implied promise by Greyhound not to alter the status quo pending arbitration ignored both prior decisions by this Court and the collective bargaining relationship between the Company and the Union. Fifteen years ago, in *Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962), this Court held that, in the absence of an explicit no-strike agreement, such a promise would be implied when there was a promise to submit contractual disputes to final and binding arbitration.

> "Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract is thus the ulti-

mate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.

The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. [Citation.] We approve that doctrine. To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare. [Citation.]

What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration."
369 U.S. at 104-06.

Accord:

Gateway Coal Co. v. United Mine Workers,
414 U.S. 368 (1974).

Thus, when the parties to a collective bargaining agreement have explicitly promised to submit their contractual disputes to final and binding arbitration,

there is an implied promise by the union not to strike over such a dispute. That promise not to strike is only as broad as the explict promise to arbitrate, and is implied in order to give the employer the benefit of the arbitration agreement, to wit: no self-help by the union that will produce irreparable harm over disputes that are arbitrable.[9]

Similarly, when a promise to arbitrate exists, the courts must imply a promise by the employer not to alter the status quo by engaging in unilateral action that would produce irreparable harm.[10] Unless such a promise is implied, the union would be deprived of its bargain, to wit: no self-help by the employer that would produce irreparable harm pending arbitration.[11] The implied promise by the employer not to engage in such unilateral action is simply the other side of

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[9]The Court in *Buffalo Forge* reaffirmed this principle: "Even in the absence of an express no-strike clause, an undertaking not to strike would be implied where the strike was over an otherwise arbitrable dispute. [Citations omitted.] Otherwise, the employer would be deprived of his bargain and the policy of the labor statutes to implement private resolution of disputes in a manner agreed upon would seriously suffer." 428 U.S. at 407.

[10]The implied promise by a union not to engage in self-help pending arbitration does not mean that all strikes over arbitrable disputes may be enjoined. See *Boys Markets v. Retail Clerks, supra,* 398 U.S. at 253-54. Similarly, it is important to note that the implied promise by an employer does not prohibit implementation of all changes in working conditions pending arbitration, but only those that would *cause irreparable harm.*

[11]A promise not to strike must be implied in order to prevent a union from circumventing the arbitration process by pressuring an employer, through a strike, to yield on a disputed issue. Similarly, a promise not to make unilateral changes, that will produce irreparable harm pending arbitration, must be implied to prevent the employer from circumventing the arbitration process by pressuring the union, through such changes, to make concessions on a disputed issue.

the coin from the union's implied promise not to strike and cause the employer irreparable harm pending arbitration. This Court recognized that principle in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., supra,* when it held that it was proper to condition an injunction against a strike on an employer's restoring the status quo pending arbitration. Such a condition was necessary "to preserve the jurisdiction of the [arbitrator] . . . by preventing injury so irreparable that a decision by the [arbitrator] in the union's favor would be but an empty victory." 363 U.S. at 534.

Thus, the Ninth Circuit's refusal to imply a promise by Greyhound not to alter the status quo pending arbitration ignores prior rulings by this Court. It also ignores the collective bargaining relationship between the Company and the Union. When the collective bargaining agreement, which is the subject of this dispute, was negotiated in 1974, Greyhound was aware of the many court decisions holding that an employer, who enters into a final and binding agreement to arbitrate contractual disputes, will be enjoined from making unilateral changes, pending arbitration, that would produce irreparable harm to the union or to its members. See, e.g., *Local 757 v. Budd Co.,* 345 F.Supp. 42 (E.D. Pa. 1972); *Local 294 v. Three Rivers Industries,* 78 LRRM 2090 (D. Mass. 1971); *I.U.E. v. Radio Corp. of America,* 77 LRRM 2201 (D. N.J. 1971); *United Steelworkers v. Blaw-Knox Foundry,* 319 F.Supp. 636 (W.D. Pa. 1970); *Teamsters Local 328 v. Armour,* 294 F.Supp. 108 (D. Mich. 1968). In fact, prior to the 1974 negotiations, *Greyhound itself had twice been enjoined from making such changes.* See *Amalgamated Transit Union v. Greyhound Lines* (N.D. Calif., Docket No. C-72-2306, February 3, 1973); *Local 1098 v. Eastern Greyhound Lines,* 225 F.Supp. 28 (D. D.C. 1963).

It ignores reality, therefore, to conclude that, when Greyhound explicitly promised to continue to submit contractual disputes to final and binding arbitration, it did not implicitly promise to refrain from making changes that would produce irreparable harm pending arbitration. As this Court recently stated in *Nolde Bros., Inc. v. Local 358, Baking & Confectionery Workers Union,* ..... U.S. ....., 51 L.Ed.2d 300, 310 (1977):

> "It is also noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy . . .
>
> * * *
>
> "The parties must be deemed to have been conscious of this . . . when they agree to resolve their contractual differences through arbitration."

So, too, Greyhound must be deemed to have been conscious of the extensive body of federal labor law which held that, when the parties to a collective bargaining agreement promise to resolve their contractual disputes through final and binding arbitration, they implicitly agree to refrain from any self-help, over such disputes, that would produce irreparable harm pending arbitration. The Ninth Circuit's failure to imply such a promise by Greyhound was a serious

error which, if not corrected, will have a negative effect on the national policy of encouraging parties to enter into arbitration agreements.

The decision of the Ninth Circuit is also in conflict with a subsequent ruling of the Fourth Circuit in *Lever Bros. Co. v. International Chem. Workers Union, Local 217, supra.*[12] In that case, the district court had enjoined Lever Brothers from altering the status quo pending arbitration of its dispute with the union. The company argued to the Fourth Circuit that "the issuance of a preliminary injunction to preserve the *status quo* pending arbitration is explicitly barred by the *Buffalo Forge* doctrine absent actual agreement to preserve the *status quo.*" 95 LRRM at 2442.

The court of appeals rejected that argument and affirmed the injunction. It found that allowing the employer to make the disputed change, pending arbitration, would produce irreparable harm and, even if the union won at arbitration, it would be " 'but an empty victory' for the union. [Citation omitted.]" 95 LRRM at 2442-43. An injunction was, therefore, proper despite the absence of an explicit promise by the employer to preserve the status quo pending

[12]The Ninth Circuit decision also conflicts with decisions in other Circuits, decided prior to *Buffalo Forge*, which recognize the propriety of injunctive relief, pending arbitration, despite the absence of an explicit promise by the employer to preserve the status quo. See *Hoh v. Pepsico,* 491 F.2d 556 (2d Cir. 1974); *Pressmen's Union v. Pittsburgh Press Co., supra,* 479 F.2d at 609-10; *Lodge 2144 v. Railway Express Agency, Inc.,* 409 F.2d 312 (2d Cir. 1969).

arbitration. Accord, *Communication Workers v. Western Electric Co., Inc., supra,* 95 LRRM at 2212.

> "[T]he rule contained in this case is obviously a two-sided coin. An injunction to preserve the *status quo* pending arbitration may be issued either against a company or against a union in an appropriate . . . case where it is necessary to prevent conduct of the party enjoined from rendering the arbitral process a hollow formality in those instances where . . . the arbitral award when rendered could not return the parties substantially to the *status quo ante.*" *Lever Bros. Co. v. Chemical Workers, supra,* 95 LRRM at 2443.

Whenever an employer or union engages in self-help, pending arbitration, that results in irreparable harm, the arbitral award will not be able to return the parties to the *status quo ante.* Injunctive relief is necessary to prevent such harm from occurring and to preserve arbitration as a meaningful method for settling labor disputes.

The decision of the Ninth Circuit, denying such injunctive relief, will frustrate the national labor policy if allowed to stand. Unless the courts imply a promise by employers not to engage in actions that will produce irreparable harm pending arbitration, unions will be reluctant to enter into arbitration agreements, and the cause of industrial peace will suffer a serious blow.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
June 24, 1977.

Respectfully submitted,
PETER NUSSBAUM,
JOHN L. ANDERSON,
NEYHART & ANDERSON,
Attorneys for Petitioners.

(Appendices Follow)

APPENDICES

Appendix A

United States District Court
Northern District of California

No. C-75-1092 WHO

Amalgamated Transit Union, Division 1384, AFL-CIO; and The Amalgamated Council of Greyhound Divisions, AFL-CIO,
Plaintiffs,

vs.

Greyhound Lines, Inc., a corporation,
Defendant.

ORDER GRANTING PRELIMINARY INJUNCTION

[June 20, 1975]

Plaintiffs, Amalgamated Council of Greyhound Divisions, AFL-CIO ("the Council") and Amalgamated Transit Union, Division 1384 ("Division 1384"), brought this action to enjoin defendant, Greyhound Lines, Inc. ("Greyhound"), from implementing certain proposed changes in the weekly work cycle of bus drivers within the jurisdiction of Division 1384. An evidentiary hearing was held on June 17, 1975, and oral argument was heard on June 19. The Court having considered the testimony of witnesses, the affidavits on file in this matter, and the written and oral argument of counsel, grants the application for

a preliminary injunction for the reason hereinafter indicated.

The Council is a labor organization representing bus drivers and other persons employed by defendant throughout the United States, including California, for the purpose of collective bargaining. It is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 152(5). The Council is comprised of numerous locals, including Division 1384. Members of Division 1384 are employed by Greyhound in the states of Oregon and Washington and in British Columbia, Canada. It is also a labor organization within the meaning of 29 U.S.C. § 152(5).

Greyhound is a national corporation licensed to carry on business within the State of California and is an employer in an industry affecting commerce within the meaning of Sections 2(2) and 2(7) of the Act, as amended, 29 U.S.C. § 152(2), (7).

Plaintiffs and defendant have for many years been parties to a series of collective bargaining agreements covering Greyhound employees who work in the Western United States. The extant agreement ("the Agreement") between the parties contains provisions for the peaceful resolution of disputes: plaintiffs are prohibited from striking, defendant is barred from conducting a lockout, and the parties are compelled to resolve all disputes through a grievance procedure, the last step of which is final and binding arbitration.

On April 17, 1975, defendant notified Division 1384's business agent that it intended to change the weekly

work cycle for certain bus runs in the Pacific Northwest effective June 25. The weekly work cycle ("the cycle") is the term used to describe the ratio between a driver's number of days of work and his or her number of days off per scheduling period. Specifically, Greyhound sought to change its bus runs from 6 days on, 3 days off and 4 days on, 3 days off cycles to a 5 days on, 2 days off cycle. A week later, Division 1384 notified Greyhound by mail that the changes could not be effectuated without the consent of the union pursuant to Section 43 of the Agreement.[1]

On May 22, 1975, Division 1384 suggested by letter that the proposed changes violated not only Section 43 of the Agreement, but Section 100 as well.[2] The letter proposed that the dispute be arbitrated prior to the implementation of the change, but Greyhound countered that although arbitration was the proper forum for resolution of the disagreement, such arbitration need not precede the changeover. Accordingly, Greyhound refused to accede to the union's proposal

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[1]Section 43 provides in pertinent part:

"RUN SET UPS—Insofar as possible, regular runs will be assigned five (5) days per week or ten (10) days in fourteen (14) days. This section can be modified to conform to local conditions upon written mutual consent by the Union and the Company."

[2]Section 100 provides in pertinent part:

"EXISTING COMPANY RULES. It is agreed that all existing rules and regulations relating to operation and conduct of Company's business not in conflict with provisions of this Agreement shall remain in effect until superseded or changed by subsequent rules and regulations not in conflict with this Agreement. The Company agrees that they [sic] will not change any rule or regulation that affects the employees beneficially without mutual agreement."

that the *status quo* be maintained pending arbitration.

Greyhound drivers "bid" for their runs on a yearly basis pursuant to Section 47 of the Agreement, and bidding this year opened in late May and continued until June 7. Because defendant had announced the proposed change in the cycle prior to the opening of bidding and had refused to maintain the *status quo* pending arbitration, drivers bid on 5 on, 2 off runs rather than on runs scheduled under the existing cycle. The bidding is now closed, and new runs have been assigned.

Plaintiffs filed this action on June 2, 1975, in an attempt to enjoin the implementation of the new run schedule pending arbitration. Section 301(a) of the Act, 29. U.S.C. § 185(a). After a brief hearing on plaintiffs' motion for a temporary restraining order on June 4, I declined to issue such an order on the ground that no injunctive relief was then necessary since the bidding was nearly completed, and the new cycle was not scheduled to go into effect for three weeks. The parties filed additional memoranda and affidavits, and the evidentiary hearing followed.

Neither side disputes the propriety of arbitration of this matter; the disagreement lies in the timing of the arbitration—i.e. before or after the cycle change is implemented.

The initial legal issue raised is whether plaintiffs must demonstrate a likelihood of success in obtaining the award in aid of which the injunction is sought. Of course such a showing is a prerequisite to the

issuance of injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure *(King v. Saddleback Junior College District,* 425 F.2d 426 (9th Cir. 1970)), but the law is unsettled as to the desirability of such a requirement in cases brought under Section 301. The resolution of this problem is tied to the cloudy relationship between Section 301 and Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107. The tension between those seemingly conflicting provisions was noted and discussed in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), and a resolution of the problem was attempted. The *Sinclair* resolution was considered in *Boys Markets v. Retail Clerks,* 398 U.S. 235 (1970), however, and was found to be deficient. In *Boys Markets* (at 254) the Court set forth principles to be considered by district courts in determining whether to grant injunctive relief in Section 301 cases.[3] The quoted factors were first proposed by Mr. Justice Brennan in his dissent in *Sinclair*:

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District

[3]Although *Boys Markets* arose in the context of management seeking to enjoin labor, the principles enunciated therein apply equally to cases like the instant one where labor seeks to enjoin management. See, e.g., Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974).

Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 370 U.S. at 228.

In Hoh v. Pepsico, Inc., 491 F.2d 556, 561 (2d Cir. 1974), the court opined that the *Boys Markets* adoption of the *Sinclair* dissent reference to the "ordinary principles of equity" indicated that the Supreme Court required a showing of some likelihood of success in Section 301 injunction cases. I see no reason to follow *Hoh* in a reading of *Boys Markets* which I feel goes against the spirit of that opinion. The Supreme Court in the *Steelworkers' Trilogy,* 363 U.S. 564, 574, 593 (1960) and in *Boys Markets* stressed the desirability of arbitration as a means of resolving labor disputes. See also, *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). Referring matters to an arbitrator rather than thrusting such disputes on federal district courts offers labor and management a forum before a person or a panel of persons intimately familiar with labor relations law and often with the particular industry—if not with the parties themselves—as well. Thus, courts have long deferred

to the expertise of the arbitrator and the wisdom of the parties in choosing the arbitration process.[4]

To determine which party is likely to succeed on the merits from the mass of conflicting evidence adduced by affidavits and oral testimony in this case would, in effect, decide the case on the merits. The interpretation of Sections 43 and 100 of the Agreement— on which the parties are in total disagreement —is properly the function and the task of the arbitrator.

I am not unaware of the plight of management in the case of totally frivolous disputes by labor aimed solely at stalling a management program, and agree with Judge Friendly's statement in *Hoh* that:

> "[i]t would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitable was *plainly without merit.*" (Emphasis added.) Id. at 561.

The claim herein, however, is one which the parties agree is arbitable, and I find that it is clearly one which is not "plainly without merit".[5]

Section 7 requires a district court to make specific findings prior to issuing injunctive relief. Several

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[4]This type of a situation differs from a suit under Section 301 of the Act directed at the enforcement of a collective bargaining agreement. See, e.g., *Hribar Trucking, Inc. v. Teamsters Chauf. & Help. Loc. No. 43,* 379 F.Supp. 993 (E.D. Wis. 1974).

[5]The gist of the dispute over the interpretation of Section 43 revolves around the need for "written mutual consent" to the alteration of run schedules. I note that Greyhound executive Dale Stucker could not recall a single instance in the past fifteen years when a cycle change had been effectuated in the absence of such mutual consent.

courts in addition to *Hoh* have held that *Boys Markets* did not invalidate the Section 7 findings requirement in Section 301 cases. *North American Coal Corp. v. Local Union 2262, U.M.W. of Am.,* 497 F.2d 459, 464 (6th Cir. 1974); *Detroit Newspaper Publishers Ass'n v. Detroit Typo. Union,* 471 F.2d 872, 875 (6th Cir. 1972), *cert. den.* 411 U.S. 967 (1973). Accordingly, a district court issuing injunctive relief must make findings that (1) the petitioning party will suffer more from the denial of the sought after relief than the responding party would suffer from its issuance; and (2) the threatened conduct by the defendant will cause irreparable injury to the plaintiff.

Although *Hoh* also held that a district court must follow the Section 7 requirement of hearing "the testimony of witnessess in open court" (491 F.2d at 560; *Railway Labor Exec. Ass'n. Bro. of Loc. Eng. v. Patton,* 500 F.2d 34, 36 (6th Cir. 1974)), I need not decide whether this is or should be the rule in all Section 301 injunction cases, because the conflicting affidavits filed in support of and in opposition to the injunction sought herein rendered it necessary to hear oral testimony on the irreparable injury and balance of harm issues.

The testimony elicited from union and management witnesses at the evidentiary hearing established that Greyhound will suffer some economic harm, the amount of which cannot now be determined, if it is enjoined from effectuating the cycle changes on June 25. Much of this loss of revenue will result from Greyhound's inability to achieve the savings in salary and

fringe benefit payments that will be the end product of the cycle change. On the other hand, the parties have been operating under the present 6 on, 3 off and 4 on, 3 off arrangement in the Pacific Northwest since the early 1960's, and this scheduling has not worked an economic hardship on the company.

Much testimony was devoted to the question of whether any drivers would lose their jobs or be forced to move from their homes as a result of the cycle change. It established, despite plaintiffs' earlier predictions of doom, that no driver will suffer either of the above consequences pending arbitration. Members of Division 1384 will suffer considerable harm from the cycle changeover, however. Whether or not a driver will be able to retain a regularly scheduled route or will be relegated to the "extra board",[6] and whether or not the eight drivers who switched from regular routes to the extra board did so voluntarily, all drivers in Division 1384 who previously worked 6 on, 3 off and 4 on, 3 off cycles will have to work 5 on, 2 off cycles if the change is implemented. This is significant.

Eugene Gambrel, a 61 year-old driver with 33 years of Greyhound service, testified that he now puts in a 44-hour week on his 4 on, 3 off, Seattle to Portland run. His weekday evenings consist of a late dinner and an early bedtime in anticipation of the next day's draining schedule. The first day of his three-day

[6]Duties of extra board drivers include: replacing regular route drivers on the latters' scheduled days off, filling in for regular route drivers who are ill or are on vacation, and taking charter assignment when the occasion arises.

respite is spent in pursuit of unwinding from the previous four and in an attempt to prepare himself to be fit enough to enjoy the next two days. If his cycle is changed to 5 on, 2 off, he will be compelled to work a 55-hour week. This, he contends, he will barely be able to do; but he will do it because he needs to maintain his salary level in order to take advantage of the company pension that awaits him four years hence. He will be compensated for this extra day of travail—in fact his salary may, as Greyhound points out, increase some 25%—but he maintains that the increase in compensation will not justify the increase in the expenditure of his energy. Plaintiffs, as the chosen representatives of all the drivers within Division 1384, similarly reject the additional salary because of an unwillingness to accept the additional work.

It may well be that Greyhound is entitled under the Agreement to change the work cycle and that Mr. Gambrel and others will have to work a 5 on, 2 off schedule. But that is the decision reserved for the arbitrator. Thus, I find that not enjoining Greyhound from implementing the schedule changes pending arbitration would harm plaintiffs much more than issuing the injunction would harm Greyhound.

The next question is whether the taking of 11 hours per week from the lives of plaintiffs' members—albeit a taking accompanied by just compensation—would result in irreparable injury to them. The precedents are sparse, but they reinforce my conclusion that the changeover here would cause irreparable injury. In *Letter Carriers, Branch 998 v. U.S. Postal Service,*

88 LRRM 3524 (M.D. Ga. 1975), irreparable injury was found in a situation much like the instant one. The court there noted that the elimination of existing postal routes and the consolidation of others would, of necessity, result in the disruption of the extant working schedules of the union members. In *International Brotherhood of Electrical Workers, Local 1245 v. Pacific Gas and Electric Company,* C-74-2537 (Dec. 6, 1974), Judge Harris of this Court enjoined the implementation of a plan to change the work week of certain of PG&E employees from Monday through Friday to Tuesday through Saturday. Finally, in the ultimate case, *Letter Carriers, Branch 352 v. U.S. Postal Service,* 88 LRRM 2678 (S.D. Iowa 1975), the court found that the elimination of a ten minute daily wash-up period constituted irreparable injury, and enjoined the Postal Service from eliminating it pending arbitration.

Finally Greyhound contends that injunctive relief should be denied because the six weeks that elapsed between the time that plaintiffs received notice of the proposed change and the time this action was filed indicates that plaintiffs "failed to make every effort to settle [the] dispute either by negotiation or with the aid of * * * voluntary arbitration". 29 U.S.C. § 108. Regardless of whether Section 108 applies to 301 injunctions, an issue I do not reach, I find that plaintiffs did make sufficient efforts to settle this matter, first by suggestion and negotiation and then by a proposal for expedited arbitration (even though the Agreement had no such mechanism). This conduct

is not comparable to that of the plaintiff unions in *Hoh v. Pepsico, Inc., supra.* There, despite some six weeks of notice before management's challenged action (a shutdown), the union failed to take any action even though an expedited arbitration process was available. The lawsuit was filed only two days before the implementation date. 491 F.2d at 558-559, 561-562.

Accordingly, I hereby enjoin Greyhound from implementing the proposed change in the present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement. This preliminary injunction shall issue upon plaintiffs giving security, approved by the Court or the Clerk of the Court, in the sum of ten thousand dollars ($10,000) for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction.

The above shall constitute the Court's Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure and 29 U.S.S. § 107.

Dated: June 20, 1975.

WILLIAM H. ORRICK, JR.
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 75-2776

Amalgamated Transit Union, Division 1384 and The Amalgamated Council of Greyhound Divisions, AFL-CIO,
Plaintiffs and Appellees,
vs.
Greyhound Lines, Inc., a corporation
Defendant and Appellant.

OPINION

[January 30, 1976]

Appeal from the United States District Court
for the Northern District of California

Before: HUFSTEDLER, KILKENNY and SNEED,
Circuit Judges.

Appellant Greyhound Lines, Inc. (Greyhound) appeals the issuance of a preliminary injunction under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, on behalf of the Amalgamated Transit Union, Division 1384, AFL-CIO, and the

Amalgamated Council of Greyhound Divisions, AFL-CIO (Union). We affirm.

Greyhound notified the Union on April 17, 1975 that effective June 25, 1975 it planned to change the work cycles of bus drivers operating the Vancouver-Seattle and Seattle-Portland runs from their existing cycles of six days on, three days off, and four days on, three days off, respectively, to a straight weekly regimen of five days on and two days off. The Union objected, arguing that such a change could not be made unilaterally under the terms of the collective bargaining agreement (agreement). Greyhound responded that its action was authorized.[1] On May 22, 1975 the Union requested, in writing, immediate arbitration and maintenance of the status quo pending arbitration. Greyhound agreed to immediate arbitration but refused to refrain from making the scheduled changes pending arbitration. Rather than proceed to arbitration, the Union petitioned the federal district court to enjoin Greyhound from implementing

[1]The dispute concerns the interpretation of the following sections of the agreement:

> § 43. RUN SET UPS—Insofar as possible, regular runs will be assigned five (5) days per week or ten (10) days in fourteen (14) days. This section can be modified to conform to local conditions upon written mutual consent by the Union and the Company.
>
> • • • •
>
> § 100. EXISTING COMPANY RULES—It is agreed that all existing rules and regulations relating to the operation and conduct of Company's business not in conflict with provisions of this Agreement shall remain in effect until superseded or changed by subsequent rules and regulations not in conflict with this Agreement. The Company agrees that they will not change any rule or regulation that affects the employees beneficially without mutual agreement.

the changes pending resolution of the matter through arbitration.

In its order granting the Union's petition for a preliminary injunction the district court indicated that to obtain a preliminary injunction the Union was not requred to make "a showing of some likelihood of success", as suggested in *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The court found the proper standard to be that the Union show that the position it would assert in arbitration was not "plainly without merit". Both of these "standards" are phrases found in the same paragraph of the opinion in *Hoh v. Pepsico, Inc., supra.*[2] The district court held that the Union's position which it would assert in arbitration was "not plainly without merit." Moreover, it found that a denial of the preliminary injunction would harm the Union more than Greyhound would suffer from its being granted and that Greyhound's work cycle changes would cause irrepar-

[2]This paragraph of *Hoh* reads as follows:

> "Furthermore, the ordinary principles of equity referred to as a guide in the portion of the Sinclair dissent that was approved in ***Boys Markets*** include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2 Cir. 1953). We think this must mean not simply some likelihood of success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. Although courts have been directed by the Steelworkers' Trilogy, 363 U.S. 564, 574, 593, 30 S.Ct. 1343, 1347, 1358, 4 L.Ed.2d 1403, 1409, 1424 (1960), to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they must continue to exercise the sound discretion of the chancellor. It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit." 491 F.2d at 561

able injury to the Union and at least some of its members.

As a result of these findings of fact and conclusions of law the district court enjoined Greyhound from implementing the proposed changes pending a decision by arbitration and conditioned the issuance of the injunction upon the Union "giving security, approved by the Court or the Clerk of the Court, in the sum of ten thousand dollars ($10,000) for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction."

Greyhound moved to increase the amount of the bond, to require it to cover attorneys fees, and to require that the bond be conditioned so that payment on it would be called for upon an arbitration award in favor of Greyhound. The lower court raised the bond to $15,000 but denied Greyhound's motion in all other respects.

Greyhound makes the following arguments in this appeal: (1) the proper showing for the issuance of a preliminary injunction pursuant to § 301 of the LMRA is a "reasonable likelihood of success", not a showing that a claim is not "plainly without merit"; (2) having to work a five day week for compensation is, contrary to the lower court's finding, not irreparable injury; (3) regardless of the merits of the issuance of the injunction, the amount of the bond set was inadequate; (4) the bond should have been conditioned to call for payment on the Union's losing on

the merits before the arbitrator; (5) the bond should have covered attorneys fees incurred by Greyhound in defending against the injunction as provided in § 7 of the Norris LaGuardia Act,[3] 29 U.S.C. § 107.

I.

Showing Necessary For A Section 301 Injunction.

In *Boys Market Inc. v. Retail Clerks Union Local 770,* 398 U.S. 235 (1970) the Supreme Court recognized that, notwithstanding the anti-injunction provisions of the Norris La Guardia Act,[4] 29 U.S.C. 101 et seq., injunctive relief under section 301 of the Labor Management Relations Act[5] is available when (1) the

---

[3]Section 7 provides in pertinent part:
No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

[4]Section 4 of the Norris LaGuardia Act provides in part:
No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
* * * *

[5]Section 301 of the LMRA (29 U.S.C. § 185(a)) provides:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of the controversy or without regard to the citizenship of the parties.

collective bargaining agreement contains a mandatory arbitration clause, (2) the underlying dispute is arbitrable, (3) the party seeking the injunction is ready and willing to arbitrate, and (4) injunctive relief is warranted under ordinary principles of equity.[6]

Greyhound's initial contention is that under the circumstances of this case injunctive relief is *not* warranted under the ordinary principles of equity. It admits that in all other respects the conditions established in *Boys Market* have been met. More particularly, Greyhound argues the ordinary principles of equity require that the Union establish that there is a "reasonable likelihood of success" in having its position in the arbitration proceedings accepted by the arbitrator. Presumably Greyhound's position is derived from those authorities which hold that the issuance of a preliminary injunction in an ordinary case requires a showing by the party seeking relief that there is a reasonable probability that he ultimately will prevail on the merits. *See* 7 MOORE'S FED. PRACTICE ¶ 65.04[1]. Rule 65, FED. R. CIV. P., normally embraces such a requirement.

The district court was correct in rejecting this contention by Greyhound. The *Steelworkers' Trilogy,* 363 U.S. 564, 574, 593 (1960), and *Boys Market,* by emphasizing the importance of arbitration to stable labor-management relations, indicate that an effort to obtain a preliminary injunction to compel arbitration

[6]*See Generally,* Note, *Federal Labor Policy and the Scope of the Prerequisites for a Boys Market Injunction,* 19 ST. LOUIS L.J. 328 (1975).

stands on a somewhat different footing than does an effort to secure an injunction in the ordinary case. The importance of arbitration justifies a partial lowering of the barrier to obtaining the injunction.[7]

The *extent* to which the barrier should be lowered in a case involving an effort to obtain a preliminary injunction to maintain the status quo pending arbitration is a difficult matter. The district court appears to have believed that a standard of "some likelihood of success", as that phrase was used in the paragraph of *Hoh* set forth in the margin,[8] is higher than the standard "plainly without merit" also appearing in the quoted paragraph. That Judge Friendly, the author of the paragraph, intended barriers of different height is by no means clear. A reasonable interpretation is that "plainly without merit" is the negative form of a standard, the affirmative form of which is "some likelihood of success". Under this view Judge Friendly was merely illustrating the standard "some likelihood of success" when he described the inequity of issuing preliminary injunctions pending arbitration when the petitioner's claims in arbitration were "plainly without merit."

In our view it is not necessary for us to resolve this dispute about what Judge Friendly meant. We hold that a plaintiff, without regard to whether he is the

[7]Adjustments of the barrier have occurred in other settings. *See, e.g.,* Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp., 443 F.2d 867, 871 (2d Cir. 1971) (injunction pendente lite in patent suit unavailable except when patent is beyond question valid and infringed).

[8]*See* note 2, *supra.*

employer or the union, seeking to maintain the status quo pending arbitration pursuant to the principles of *Boys Market,* need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor. If there is a genuine dispute with respect to an arbitrable issue, the barrier we believe appropriate has been cleared.

Although the standard "not plainly without merit" employed by the district court differs in focus from that which we have enunciated, our review of the record convinces us that in this case arbitration will not be a futile endeavor and that a genuine dispute with respect to an arbitrable issue exists. Moreover, we are mindful that the issuance of a preliminary injunction inescapably involves the exercise of discretion by the trial court and should not lightly be disturbed on appeal. *See* 7 MOORE'S FED. PRACTICE, ¶ 65.04 [2], 65-49.

II.

Irreparable Injury.

It is obvious that a lowering of the barrier regarding the showing that a plaintiff must make with respect to the merits of the controversy serves to increase the intensity of disputes between the plaintiff and defendant regarding the scope of the injury that either granting the injunction will impose on the defendant or denying it will thrust upon the plaintiff. This increased intensity provides a strong reason why we embrace the position that section 7 of the Norris LaGuardia Act, insofar as it precludes the issuance

of a temporary or permanent injunction "except after hearing the testimony of witnesses in open court", is applicable to proceedings to obtain preliminary injunctions pursuant to section 301 of the Labor-Management Relations Act. In this we join an impressive array of authorities. *See Hoh v. Pepsico, Inc.,* 491 F.2d 557 (2d Cir. 1974); *United States Steel Corp. v. United Mine Workers of America,* 456 F.2d 483 (3d Cir. 1972); *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union,* 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973); *Emery Air Freight Corp. v. Local Union 295,* 449 F.2d 586, 588-89 (2d Cir. 1971), *cert. denied,* 405 U.S. 1066 (1972). We recognize, of course, that there may be circumstances where the undisputed facts so clearly indicate that injunctive relief is necessary that "hearing the testimony of witnesses in open court" would be useless. Such circumstances did not exist in this case and probably will exist only infrequently. It follows that the trial court acted properly in conducting a hearing in which the testimony of witnesses was received in open court.

We also hold, and for like reasons, that the requirement of section 7 of Norris LaGuardia that there be a finding of fact "that as to each item of relief granted greater injury will be inflicted upon the complainant by the denial of relief than will be inflicted upon defendants by the granting of relief" is applicable to efforts to obtain a *Boys Market* injunction pursuant to section 301 of the LMRA. Quite properly the district court recognized this obligation and

made such findings. We cannot say that its finding "that not enjoining Greyhound from implementing the schedule changes pending arbitration would harm plaintiffs much more than issuing the injunction would harm Greyhound" is clearly erroneous.

It is, of course, also necessary that a plaintiff show that the denial of the preliminary injunction will cause irreparable injury to him. *See Boys Market Inc. v. Retail Clerks Union Local 770, supra* at 254; *cf.* Norris LaGuardia Act, section 7(b), 29 U.S.C. § 107. The district court in this case made such a finding and, although we adjure trial courts not to treat inconvenience to a few union members as the irreparable injury required by ordinary principles of equity, we are not prepared to say that this finding is clearly erroneous, or that the issuance of the preliminary injunction was an abuse of discretion. Our reminder to treat "irreparable injury" as a meaningful requirement springs from our awareness that eliminating any requirement to show probable success in the arbitration proceedings increases accessibility to preliminary injunctions and, in the type of case here before us, further limits the opportunity of the employer to make changes in work rules pending arbitration. Maintenance of the status quo in all cases pending arbitration may be bargained for by the union and agreed to by the employer. Its equivalent should not be derived from *Boys Market*. Treating irreparable injury as a significant requirement, even when the union is the plaintiff seeking the injunction, will tend to preclude this result.

III.

The Conditions of the Bond.

Greyhound's contention that the bond should have been conditioned to call for payment on the Union's losing on the merits before the arbitration is not supported by authority. Surety bonds required by reason of Rule 65(c), FED. R. CIV. P., are conditioned on "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." This means what it says. As Moore puts it, "Recoverable damages under the bond are those that are directly attributable to the restraining order or injunction, as the case may be, and which are incurred or suffered by a party as a result of the wrongful restraint, and does not include damages occasioned by the suit independently of an injunction granted therein." 7 MOORE'S FED. PRACTICE, ¶ 65.10[1], 65-96, 97. Wright and Miller are in accord. 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2973 (1973).

The pertinent language of section 7(e) of the Norris LaGuardia Act is not significantly different from that of Rule 65(c). It provides that the amount of the bond shall be sufficient "to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such an order or injunction." We agree with the court in *United States Steel Corporation v. United Mine Workers of America, supra* at 488, when it held that the bond in a *Boys Market* proceeding was payable "only if the preliminary injunction is found to have been improv-

idently or erroneously issued, that is, where the court did not hold a proper hearing or failed to make the factual determination mandated by Part V of the *Boys Market* opinion, or where the court erroneously issued a preliminary injunction over a labor dispute not covered by the contract grievance-arbitration provision." To accept Greyhound's contention that the bond should be payable in the event it wins the arbitration would fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Market* preliminary injunction.

We, however, do believe that Greyhound is correct in asserting that the bond could embrace reasonable attorneys fees as a part of the costs secured. Such fees are permitted under section 7(e) of the Norris LaGuardia Act and also were permitted by the court in *United States Steel Corporation v. United Mine Workers of America, supra* at 488, at the request of the union in a *Boys Market* proceeding. The union suggests that *Mine Workers* be read to limit inclusion of reasonable attorneys fees to instances in which a union is being enjoined. Although it is well-known history that the Norris LaGuardia Act was enacted to protect labor from anti-labor courts, we decline to use that history to justify an unevenhanded treatment of reasonable attorneys fees incurred in defending against an erroneous issuance of a preliminary injunction.

Nonetheless, having held that the preliminary injunction was properly issued the failure of the bond

to include reasonable attorneys fees in this case imposed no injury or hardship on Greyhound.

AFFIRMED.

Appendix C

No. 75-1584. Greyhound Lines, Inc., petitioner, v Amalgamated Transit Union, Division 1384, AFL-CIO, et al.

October 4, 1976. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petition for writ of certiorari granted, judgment vacated and case remanded to the Court of Appeals for further consideration in light of Buffalo Forge Co. v United Steelworkers of America, 428 US ....., 49 L Ed 2d 1022, 96 S Ct 3141 (1976).

Appendix D

United States Court of Appeals
for the Ninth Circuit

No. 75-2776

Amalgamated Transit Union, Division 1384 and The Amalgamated Council of Greyhound Divisions, AFL-CIO, Plaintiffs-Appellees,

vs.

Greyhound Lines, Inc., a corporation, Defendant-Appellant.

[Filed April 1, 1977]

Appeal From the United States District Court
for the Northern District of California

OPINION

Before: HUFSTEDLER, KILKENNY AND SNEED, Circuit Judges.

SNEED, Circuit Judge:

In our original opinion, *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*, 529 F.2d 1073 (9th Cir. 1976), we affirmed the issuance of a preliminary injunction under section 301 of the Labor Management Relations Act, 29 U.S.C. §185,

in favor of Amalgamated Transit Union, Division 1384, AFL-CIO and Amalgamated Council of Greyhound Divisions, AFL-CIO (Union). This injunction compelled the employer, Greyhound Lines, Inc. (Greyhound), to maintain the status quo pending arbitration of a dispute concerning Greyhound's right under the collective bargaining agreement to alter the status quo, *to wit,* the employees' work schedule.[1] The Supreme Court vacated our judgment and remanded the case to us "for further consideration in light of *Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. ....., 96 S. Ct. 3141, 49 L. Ed. 2d 1022 (1976)." *Greyhound Lines, Inc. v. Amalgamated Transit Union, Division* 1384, ... U.S. ....., 97 S. Ct. 43 (1976). Having considered the impact of *Buffalo Forge* on the case before us, we now reverse the judgment of the district court.

In *Buffalo Forge,* the Supreme Court held that a preliminary injunction cannot issue against a union participating in a sympathy strike despite a no-strike clause in the labor contract and the arbitrability of the question of whether the sympathy strike violates this no-strike clause. The exception to the anti-injunction provision[2] of the Norris-LaGuardia Act established in *Boys Market, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970) did not apply because the dispute underlying the sympathy strike was not subject to the contract's settlement procedures. Under such circumstances the *quid pro quo* for the union's promise not to strike was absent. Being absent, the promise not to strike, properly construed, did not extend to the type of dispute in question. In the absence of a promise not to strike, a strike could not be enjoined.

[1]The arbitrator has ruled for Greyhound. This does not necessarily moot the case, because "the underlying dispute between the parties is 'one capable of repetition, yet evading review.' *Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S. Ct. 279, 283, 55 L.Ed. 310 (1911)", Nebraska Press Ass'n v. Stuart, ... U.S. ....., 96 S. Ct. 2791, 2797 (1976); Roe v. Wade, 410 U.S. 113, 125 (1973); Williams v. Alioto, ... F.2d ....., (9th Cir. Jan. 25, 1977).

[2]29 U.S.C. § 104.

The same reasoning applies to the facts of this case. An undertaking to preserve the status quo pending arbitration would be to Greyhound what an undertaking not to strike would be to a union. The promisee of each undertaking would obtain its benefits in exchange for a consideration furnished by it. In this case, however, the Union's promise to submit the dispute to arbitration and not to strike could not have been given in exchange for an express promise by Greyhound to preserve the status quo because no such promise was made.

Moreover, no basis exists for finding such a promise implied in fact. While a promise to submit a dispute to arbitration may justify a finding of an implied duty not to strike, *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368 (1974), such a promise does not imply a duty on the part of the employer to preserve the status quo pending arbitration. The source of this difference is that a strike pending arbitration generally will frustrate and interfere with the arbitral process while the employer's altering the status quo generally will not. The implication of a

duty not to strike may be "essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract." *Buffalo Forge Co. v. United Steelworkers of America, supra,* ..... U.S. at ....., 96 S. Ct. 3149. Ordinarily there will exist no such necessity to imply a duty to preserve the status quo. In any event, it is clear that in this case the arbitration of the dispute will be unaffected by Greyhound's alteration of the status quo. Should Greyhound be wrong in its position in arbitration the situation can be restored substantially to the status quo *ante. Cf. Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970).

There being neither an express nor implied in fact promise by Greyhound to preserve the status quo, the injunction to preserve it pending arbitration was improperly entered.

REVERSED.

Appendix E

29 U.S.C. § 101:

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any retraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 104:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 185(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Supreme Court, U. S.
FILED
JUL 28 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1869

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO;

AND

THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,

Petitioners,

VS.

GREYHOUND LINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of Respondent in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1869

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO;

AND

THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,

Petitioners,

VS.

GREYHOUND LINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of Respondent in Opposition

Respondent respectfully prays that this Court deny the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Petition presents no question appropriate for review by this Court.

QUESTIONS PRESENTED FOR REVIEW

The Petition asks this Court to review the judgment of the Ninth Circuit reversing an order issuing a preliminary

injunction. The injunction intruded the district court into the merits of an arbitrable labor dispute by restraining an employer from taking certain action pending the arbitrator's ruling as to its right to take that action. The arbitration has been held and the arbitrator ruled against petitioner over a year ago. Therefore, review of the judgment of the Ninth Circuit can have no bearing on the underlying labor dispute. Moreover, the preliminary injunction expired by its terms, also over a year ago, upon the arbitrator's ruling in favor of the employer. Therefore, even if the judgment of the Ninth Circuit were in error, there remains no preliminary injunction to be reinstated. Based on these facts petitioner previously argued to this Court that this action was moot. (Brief in Opposition, No. 75-1584, pp. 12-13) The only differences are that the case is a year older and the Union is the petitioner now.

This Court should deny the Petition. If, however, the Petition were granted, the questions for review would be:

1. May a district court interfere in a labor dispute and issue a preliminary injunction which enjoins an employer from taking action pending arbitration where the employer has taken no action in violation of its promise to arbitrate the dispute and the preliminary injunction is not necessary to preserve the arbitrator's jurisdiction or ability to resolve the dispute?

2. May a district court issue a preliminary injunction restraining an employer from taking certain action pending arbitration and thereby grant preliminarily the very relief which only the arbitrator could grant permanently without making the injunction bond payable upon the Union's losing on the merits before the arbitrator?

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Northern District of California under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("Section 301"). Jurisdiction in the district court was based upon Section 301 and upon 28 U.S.C. § 1337.

The employer is Greyhound Lines, Inc. ("Greyhound" or the "Company"). The plaintiffs are Amalgamated Transit Union, Division 1384, AFL-CIO, and The Amalgamated Council of Greyhound Divisions, AFL-CIO. Division 1384 represents Greyhound bus drivers in the Vancouver-Portland area and the Council represents all Greyhound bus drivers. Division 1384 and the Council are referred to in this brief collectively as "the Union".

Greyhound and the Union have been parties to a series of collective bargaining agreements for many years. The collective bargaining agreement relevant to this litigation (the "Agreement") contains provisions which govern the resolution of disputes arising from the Agreement. Specifically, the Agreement prohibits the Union from striking and prohibits the Company from engaging in a lockout. The Agreement also provides for the resolution of disputes by binding arbitration. (App. A, p. ii)* There is no provision which requires Greyhound to maintain the status quo pending arbitration where it takes action which the Union contends violates the Agreement.

On April 17, 1975, the Company notified the Union that it was going to change the work cycles on bus runs from Vancouver to Seattle and Seattle to Portland from six days on, three days off and four days on, three days off, respectively, to five days on, two days off. The change was to be effective June 25. (App. A, pp. ii-iii; App. B, p. xiv)

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*References to the Appendices to the Petition are cited as "App. ...., pp. ....".

The Union protested the change and contended that the Agreement prohibited the Company from making the change without the Union's consent. The Company contended that it had a perfect right under the collective bargaining agreement to make that change. The Union asked the Company to arbitrate the dispute immediately and, pending arbitration, to maintain the status quo. The Company agreed to immediate arbitration and named the Company's arbitrator. It declined to maintain the status quo pending arbitration. (App. A, p. iii-iv; App. B, p. xiv) Instead of taking the Company up on its offer to arbitrate immediately, the Union filed this proceeding on June 2, 1975. (App. B, pp. xiv-xv)

The complaint sought to enjoin the implementation of the new 5-2 run cycle pending arbitration, and the Union moved for a preliminary injunction. The District Court set the mater for an evidentiary hearing on June 17, 1975. The matter was argued on June 19. At that argument the Court expressed its opinion that the Union's showing of irreparable injury was "flimsy at best". Then on June 20 the Court issued its Order granting a preliminary injunction prohibiting Greyhound from changing the "present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement". (App. A, p. xii)

The Order provided that the Union should file a bond for "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction". (App. A, p. xii) Greyhound moved for an order to require the bond to be conditioned so that it was payable upon the arbitrator ruling in favor of Greyhound. On June 30, 1975 the Court denied that request. (App. B, p. xvi)

The Ninth Circuit affirmed the issuance of the preliminary injunction and Greyhound petitioned this Court to review that judgment by writ of certiorari. This Court granted the petition and vacated the judgment for reconsideration in light of *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397 (1976). On reconsideration the Ninth Circuit reversed. It held issuance of the injunction improper because Greyhound had neither explicitly nor implicitly promised to maintain the status quo and because Greyhound's action would not "frustrate and interfere with the arbitral process", but would leave it "unaffected". (App. D, pp. xxix-xxx)

ARGUMENT

The Petition asks this Court to determine the principles which should control the issuance of a preliminary injunction in an arbitrable labor dispute. This Court has already considered that question and has already established those principles. Moreover, those principles are clear and undisputed. The lower courts have received ample guidance as to their application, most recently by this Court's decision and opinion in *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397 (1976). There is no reason for this Court to pass on those principles again.*

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*Greyhound's original Petition to this Court said that the Court had "never before directly passed" on the circumstances in which "a district court may restrain an employer in an arbitrable labor dispute from taking action pending arbitration". (Petition, No. 74-1584, p. 9) That was before *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397 (1976), was decided. Although *Buffalo Forge* involved an injunction action against a union, the principles it establishes apply to actions against an employer as well, and the Ninth Circuit so held in this case. See also *United Mine Wkrs. v. Rochester & Pitts. Coal Co.,* 416 F.Supp. 74, 77-78 (W.D. Pa. 1976); *Note, The Supreme Court, 1975 Term,* 90 HARV. L. REV. 251-54 (1976).

Finally, far from proving any error of law, the Petition demonstrates that the Ninth Circuit applied the correct principles in its consideration of this case. The most that the Petition does is to raise questions of fact. As to that, the Petition is wrong on the facts.

I. The Principles Which Control the Issuance of Injunctive Relief in an Arbitrable Labor Dispute Have Been Clearly Established by This Court.

The decisions of this Court have established that the judiciary may not intrude into an arbitrable labor dispute where that intrusion is not necessary to make the arbitral process work. That principle derives from the congressional and judicial policy that the preferred method for resolution of labor disputes is "[f]inal adjustment by a method agreed upon by the parties. . . ." Section 203(d) of the Labor Management Relations Act (the "Act"), 29 U.S.C. § 173(d); see, *e.g., Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 411-12 (1976). Ever since the *Steelworkers' Trilogy,*• this Court has made it clear that "[t]hat policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 566 (1960).

First, the *Steelworkers' Trilogy* establishes what a court is not to do when faced with an arbitrable labor dispute. The *Steelworkers' Trilogy* teaches that where the parties have agreed to arbitration, they have bargained for a decision by the arbitrator, not a court. Accordingly, "the courts

•*United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

have no business" becoming involved in the merits of disputes over the interpretation or application of collective bargaining agreements. *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599 (1960).

> "[I]n the *Steelworkers Trilogy* we emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets v. Retail Clerks Union,* 398 U.S. 235, 242-43 (1970).

This Court recently reaffirmed that principle:

> "[T]he parties' agreement to adjust or to arbitrate their differences themselves would be eviscerated if the courts for all practical purposes were to try and decide contractual disputes at the preliminary injunction stage." *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 412 (1976).

Second, the *Steelworkers' Trilogy* establishes that when faced with an arbitrable labor dispute, "the function of the court is very limited". *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567 (1960). The *Trilogy* goes on to define what that "very limited" function is. "The judiciary sits . . . to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 585 (1960). The arbitrator "sit[s] to settle disputes." *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596 (1960). Where the arbitral process is working by itself and the arbitrator has the jurisdiction and ability to settle the dispute, there is no need for the courts to intervene and therefore the courts should stay out of it.

Thus in a Section 301 suit a court may not become a participant in an arbitrable dispute "for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator". *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 411 (1976). Instead, its role is limited to "enforcing promises to arbitrate", *Id.,* at 411; see *Id.,* at 409, by enjoining conduct which "would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute". *Id.,* at 407.

This Court has consistently adhered to these principles. A party who refuses to arbitrate a dispute he promised to arbitrate may be ordered to arbitrate. In such a situation the reluctant party has violated his promise to arbitrate, and judicial intervention is necessary to make the arbitral process work. *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). Similarly, where a party to a dispute tries to thwart the arbitral process by force or by acting in such a way as to render the arbitrator's decision futile, he has in effect violated his promise to arbitrate because he has made it impossible for the arbitral process to work. Here, too, the judiciary may intervene. *Boys Markets v. Retail Clerks Union,* 398 U.S. 235, 253-54 (1970); *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.,* 363 U.S. 528 (1960).

However, where conduct does not violate a party's promise to arbitrate, the judiciary may not intervene. Thus in *Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970), this Court held that a district court may enjoin a violation of a no-strike clause where the strike is over an arbitrable dispute. In *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,*

370 U.S. 254 (1962), this Court held that a district court may not entertain an action for damages for violation of a no-strike clause, which was also over an arbitrable dispute. In the first case an injunction was required to make the arbitral process work, because the strike thwarted that process; therefore the judiciary could intervene. In the second there was no need for judicial involvement because the strike was over, and it did not thwart the arbitral process; therefore the judiciary could not intervene.

In *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.,* 363 U.S. 528 (1960), a case brought under the Railway Labor Act, 45 U.S.C. § 151, *et seq.,* this Court held that an injunction against a strike may be conditioned on the employer's maintaining the status quo pending arbitration, only where that condition is necessary "to preserve the jurisdiction of the [Arbitrator] . . . ." That is, where absent the condition "a decision of the . . . [Arbitrator] in the unions' favor would be but an empty victory". 363 U.S. at 534.* *Accord, Westchester Lodge 2186 v. Railway Express Agency, Inc.,* 329 F.2d 748, 753 (2d Cir. 1964); *Local 757 v. Budd Co.,* 345 F.Supp. 42, 47 (E.D. Pa. 1972) (a Section 301 case).**

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*The railroad's action in *Brotherhood* did "not merely concern rates of pay or job assignments", but involved the elimination of some jobs and the relocation of others in a situation in which by the time of the "frequently long-delayed . . . [decision by the arbitrator] it might well be impossible to make . . . [the employees] whole in any realistic sense." 363 U.S. at 534. This Court ruled that requiring the railroad to preserve the status quo in order to preserve the jurisdiction of the arbitrator was not an abuse of discretion. 363 U.S. at 535.

**Similarly, *Chicago & N.W. Ry. v. United Transportation Union,* 402 U.S. 570, 583 (1971), also a Railway Labor Act case, holds that a union may be enjoined from striking when it has not performed its statutory duty to "exert every reasonable effort to make and maintain agreements . . ." only where "such a remedy is the only practical, effective means of enforcing the duty. . . ."

Just last term this Court again applied these principles and held that a court has no authority to enjoin a sympathy strike alleged to be in violation of a collective bargaining agreement. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). There the propriety of a sympathy strike under a collective bargaining agreement was itself the dispute which was subject to arbitration. The strike did not "interfere with and frustrate the arbitral processes" because it had "neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain". *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407-08 (1976). If the arbitrator ruled in the company's favor he could simply order the sympathy strike stopped and that order would be subject to judicial enforcement. *Id.* at 405. Moreover, enjoining the sympathy strike pending arbitration would grant preliminarily the very relief which only the arbitrator could grant permanently and on the merits. Therefore to grant that relief necessarily would intrude the court into "preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator", and accordingly would impermissibly permit the court "to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process". *Id.*, at 410-11. That, *Buffalo Forge* held, a court may not do.

These cases underscore and illustrate the "very limited" role which courts may play in resolving arbitrable labor disputes. The principle they lay down is that a court may not intervene in an arbitrable labor dispute except where such intervention is "essential to carry out promises to

arbitrate and to implement the private arrangements for the administration of the contract." *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 at 411 (1976). Therefore an employer may not be restrained from taking disputed action pending arbitration where such an injunction is not necessary "to preserve the jurisdiction" of the arbitrator or where that remedy is not the "only practical, effective means" of insuring that the exercise of that jurisdiction will not be "futile". See, pp. 7-10, above; *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1341-42 (3d Cir. 1976); *Note, The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 247-55 (1976) (courts may "intervene only when necessary to protect the arbitral jurisdiction and then only in a manner that avoids examination of the merits". 90 Harv. L. Rev. at 251).

These are precisely the principles applied by the Ninth Circuit in this case. The judgment below rests on the holding that Greyhound's conduct here did not interfere with the arbitral process, but left it "unaffected"; if the arbitrator were to rule against Greyhound, the "situation [could] be restored substantially to the status quo *ante*":

> "While a promise to submit a dispute to arbitration may justify a finding of an implied duty not to strike, *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974), such a promise does not imply a duty on the part of the employer to preserve the status quo pending arbitration. The source of this difference is that a strike pending arbitration generally will frustrate and interfere with the arbitral process while the employer's altering the status quo generally will not. The implication of a duty not to strike may be 'essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract.' *Buffalo Forge Co. v. United Steel-*

workers of America, supra, ... U.S. at ....., 96 S. Ct. 3149. Ordinarily there will exist no such necessity to imply a duty to preserve the status quo. *In any event, it is clear that in this case the arbitration of the dispute will be unaffected by Greyhound's alteration of the status quo. Should Greyhound be wrong in its position in arbitration the situation can be restored substantially to the status quo ante. Cf. Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970)." App. D, pp. xxix-xxx (emphasis added).

Contrary to the Union's assertion (Pet., pp. 28-29), the Ninth Circuit's holding does not conflict with that of the Fourth Circuit in *Lever Bros. Co. v. Intern'l Chem. Wkrs.*, ... F.2d ...., 95 LRRM 2438 (4th Cir. Nov. 30, 1976). In *Lever Bros.* the employer did not simply propose to change the hours which its employees worked. Instead, it intended permanently to transfer its plant from Baltimore, Maryland to Hammond, Indiana. 95 LRRM at 2442. The Fourth Circuit held that those facts made *Lever Bros.* a different case from this case. Unlike this case, the Fourth Circuit found, the preliminary injunction there was necessary "to save the arbitration clause," 95 LRRM at 2440, because the arbitrator "could not return the parties substantially to the *status quo ante*", 95 LRRM at 2443, and the employer's action would therefore render an arbitration award in the union's favor "'an empty victory' for the union". 95 LRRM at 2442.Thus there is no conflict between the Fourth Circuit's decision in *Lever Bros.* and the Ninth Circuit's decision here. The Fourth Circuit addressed a situation which the Ninth Circuit did not need to reach. The Fourth Circuit's holding that an injunction may issue to prevent conduct which would render the arbitral process "a hollow formality", 95 LRRM at 2443, is not inconsistent

with the Ninth Circuit's holding that no injunction may issue against conduct which does not have that effect.*

The Union also attempts to create a reviewable issue by arguing that this case does not involve an injunction against a union and therefore that Section 4 of the Norris-LaGuardia Act, which prohibits such injunctions, is inapplicable. (Pet., pp. 10-15) That argument is beside the point. To begin with, the Union must prove a violation of some contract right for there to be jurisdiction to issue a Section 301 injunction, and the issue is not whether Norris-LaGuardia Section 4 prohibits the enforcement of that contract right, but whether the right exists.** It does not. (Part II, below)

Moreover, the principles which govern the judiciary's function in arbitrable labor disputes derive not from Section 4, but from the central role which arbitration plays in the national labor relations policy.*** Those principles

*The Fourth Circuit noted that:

"Whether or not Greyhound was permitted to unilaterally alter the work schedules of its employees under the collective bargaining agreement, the employees would still be employed, and still earn wages albeit on different schedules. In his award, the arbitrator *could* subsequently alter pay schedules or revise the work schedules depending on whether he found for the union or the company and return the parties to substantially the *status quo ante*." 95 LRRM at 2443.

**The Union recognizes that, but tries to assume the question away. It relies on an earlier case in which the Ninth Circuit found that "the suit does fall within Section 301" (Pet., p. 15); this suit, however, does not, because no Section 301 right was violated here. (Part II, below)

***The requirement in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960), that the status quo be maintained pending arbitration was directed at the employer, not the union. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,* 370 U.S. 254 (1962), was an action for damages; Section 4 had no application to it. Each of the cases which makes up the *Steelworkers' Trilogy* was an action by the union against an employer. So was *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

do not change depending on whether the employer or the union is the plaintiff. See *United Mine Wkrs. v. Rochester & Pitts. Coal Co.*, 416 F.Supp. 74, 77-78 (W.D. Pa. 1976); *Note, The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 251-54 (1976).

Indeed, the Union's lengthy discussion of Section 4 of the Norris-LaGuardia Act is proved irrelevant by the Union's own argument. The Union explicitly admits that this case is governed by the principles set forth above. Thus the Petition says that "The test for issuing injunctions pending arbitration is whether, in the absence of equitable relief, 'the arbitration process will be frustrated' 428 U.S. at 412." (Pet., p. 22) See also Pet., p. 21 (can only enjoin conduct which "'interferes with and frustrates arbitral process'"); Pet., p. 26 (may issue injunction to prevent conduct "'so irreparable that a decision by the [arbitrator] in the union's favor would be but an empty victory'").

Thus the Petition presents no question of law for this Court to consider. The principles which govern this case are clear and undisputed. The most that the Union does is to argue the facts. There is no reason for this Court to become involved in such factual disputes. Moreover, the Union is wrong as to the facts.

First, the Union tries to distinguish *Buffalo Forge* on the facts. The Union says that in "*Buffalo Forge*, there was no promise to arbitrate the underlying dispute", whereas in this case "the underlying dispute was arbitrable". (Pet., p. 22) But that misunderstands the facts of *Buffalo Forge*. The dispute in *Buffalo Forge* was "whether the sympathy strike violated the Union's no-strike undertaking". 428 U.S. at 410. That dispute was subject to arbitration. 428

U.S. at 410; Pet., p. 19.* Thus the union's right (or duty not) to take the action of striking was itself the arbitral dispute; the action was not an attempt to frustrate the arbitral process by using economic warfare to win an arbitrable dispute; and therefore it could not be enjoined. The dispute in this case is whether action by Greyhound to change the work cycle of bus drivers violated the terms of the collective bargaining agreement. That dispute was subject to arbitration. (Pet., App. A, p. iii; App. B, p. xiv) Thus Greyhound's right (or duty not) to take the action of changing the work cycle was itself the arbitrable dispute; the action was not an attempt to frustrate the arbitral process by using economic warfare to win the dispute;** and therefore it could not be enjoined. The only difference between this case and *Buffalo Forge* is that the parties are reversed. That difference makes no difference.

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*The Petition says that the events which caused the sympathy strike were not subject to arbitration. (Pet., p. 22, n. 7) That is irrelevant. The economic causes of Greyhound's decision to change the work cycle were equally not subject to arbitration. The dispute in *Buffalo Forge*—whether the sympathy strike violated the collective bargaining agreement—was subject to arbitration, just as was the dispute here—whether Greyhound's action violated the collective bargaining agreement.

**That is why the Union's assertion that the Company's action was "self help", like a strike, is, at best, a play on words, and is certainly wrong. The injunction was necessary, the Union goes on, to prevent Greyhound from making the work cycle changes and thereby "circumventing the arbitration process by pressuring the union, through such changes, to make concessions on a disputed issue". (Pet., p. 25, n.11) But the Union does not say what it was that Greyhound was "pressuring" it to do. Greyhound's action was not "pressuring" the Union to make "concessions" on some dispute any more than was the sympathy strike in *Buffalo Forge*. Greyhound's action *was* the dispute. The way to resolve the dispute was to arbitrate it; Greyhound's taking the action did not and could not pressure the Union into not arbitrating it; indeed so far from trying to "pressure" the Union into making such a "concession", Greyhound affirmed its willingness to make good its promise to arbitrate, and did.

The Union also argues the facts of this case. It says that Greyhound's action should have been enjoined because it would cause "irreparable" injury. (Pet., p. 23) To begin with, one cannot be irreparably injured by being deprived of a right he does not have. The Union did not bargain to have the employer maintain the status quo pending arbitration. It bargained for the right to have the arbitrator decide disputes and, if he ruled in the Union's favor, to fashion an appropriate remedy. Greyhound agreed to arbitrate the dispute and did. Therefore the Union got everything it bargained for, and was deprived of nothing.* (See Part II, below.) Moreover, the supposed irreparable injury was that some bus drivers would have to work five (5) days a week for pay pending arbitration. That "irreparable" injury was said by the District Court to be "flimsy at best" (R. Tr. 200) and the Ninth Circuit merely held that the finding was "not clearly erroneous" or "an abuse of discretion". (Pet. App. B, p. xxii)

Most important, the test is not whether a party would suffer "irreparable" injury pending arbitration, but whether injunctive relief is necessary to prevent the arbitral process from becoming a nullity. There are many injuries which might be said to be "irreparable" in the abstract which do not meet that test. For example, the injury caused by the sympathy strike in *Buffalo Forge*—the employer's inability to operate—was at least as "irre-

*The Union recognizes that it must be deprived of a right in order to be irreparably injured. It says it was deprived of the "benefit it expected to receive by agreeing to arbitration" (Pet., p. 18), and that the "benefit it bargained for" was that the employer would not change the status quo pending arbitration. (Pet., p. 22) The trouble is the Union bargained for no such right, and the Agreement contains no such terms.

parable" as the so-called injury here.* Yet neither of these injuries is " 'so irreparable that a decision of the [arbitrator] . . . would be but an empty victory.' " Pet., p. 26; *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 534 (1960). Here Greyhound's action left the arbitral process "unaffected"; had the arbitrator ruled against Greyhound, "the situation [could have been] restored substantially to the status quo *ante*." (Pet. App. D, p. xxx)

The Ninth Circuit was right on the facts as well as the law.

II. The Ninth Circuit Correctly Ruled That No Injunction Could Issue Where There Was No Wrong to Enjoin.

The Union complains that the Ninth Circuit failed to imply a promise by Greyhound to preserve the status quo pending arbitration. (Pet., pp. 22-28) Although the Union initially seems to say that the Ninth Circuit made an error of law in requiring such a promise (Pet., pp. 17-18), it later abandons that theory and expressly says that an employer's action pending arbitration may be enjoined only if that action violates such an implied promise.** (Pet., pp. 24-25) That concession is understandable.

Section 301(a) of the Labor-Management Relations Act grants the district courts jurisdiction to hear suits "for violation[s]" of labor contracts, and no other suits. Therefore, a district court has no jurisdiction to issue a Section

*See also, *e.g.*, *Letter Carriers, Branch 352 v. U.S. Postal Service*, 88 LRRM 2678 (S.D. Iowa 1975) (elimination of 10-minute wash-up period found to be "irreparable").

**The Union says that an employer impliedly promises to refrain from action pending arbitration which would cause "irreparable harm". (Pet., p. 25 and n.11) That, however, is not the right test. (See Part I, above.)

301 injunction absent a finding that the conduct to be enjoined violates the applicable labor contract. See, *e.g., United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (holding a party to a labor contract cannot be ordered to arbitrate a dispute unless his refusal to arbitrate violates the contract). *Accord, John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1966); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). *Compare, Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 380 (1974) (holding union cannot be enjoined from striking unless strike violates a contract duty); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 408, n.10 (1976) (discussing *Gateway*). Moreover, district courts have no authority to enjoin conduct just because "it is claimed to be in breach of [a labor] contract and because this claim is itself arbitrable". *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 at 408-09, n.10 (1976). *Buffalo Forge* and other decisions of this Court establish that a district court's Section 301 jurisdiction with respect to disputes arbitrable under labor contracts is limited to enforcing "the arbitration provisions of such contracts". *Id.*, at 409; see Part I, above.

An employer's promise "to submit grievance disputes to the process of arbitration" is the "quid pro quo" for the no-strike clause. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 248 (1970); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). Therefore an employer who agrees to arbitrate an arbitrable dispute has made good on his side of the bargain, and has done all he promised to do. If he has in fact promised further to maintain the status quo pending arbitration, his failure to maintain it might be in violation of his promise to arbitrate, and his

conduct might, in a proper case,* be enjoined. But absent such an extra promise, an employer who takes action and who voluntarily submits a dispute as to the propriety of that action to arbitration cannot be said to have violated his promise to arbitrate. Therefore, he has done no wrong to be enjoined in a Section 301 suit, and there is nothing to enjoin him from doing.**

Where an employer's action does not violate the promise to arbitrate, the only possible predicate upon which a court may issue a preliminary injunction against that conduct would be the court's preliminary view that the conduct violates some substantive promise of the contract. But whether that promise is violated and how to enforce it is precisely what the parties bargained to have the arbitrator, not the courts, resolve. Therefore the courts have no busi-

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*Not every employer action in violation of such a promise could be enjoined, just as not every strike over an arbitrable dispute can be enjoined. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 253-54 (1970). Those employer actions, such as a lockout, which are attempts to force a settlement by economic force, are the classic examples of actions which could properly be enjoined. Other such situations would appear to be rare. (Pet. App. D, pp. xxix-xxx) At least in the ordinary case, whether an employer has promised to maintain the status quo pending arbitration and, if so, what remedy should be imposed for violation of such a promise, are matters to be resolved by the arbitrator, not the courts. *Detroit News Pub. Ass'n v. Detroit Type Union No. 18*, 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

**The parties have bargained for a decision by the arbitrator and a remedy fashioned by him. Where the parties have submitted a dispute to arbitration, they have done what they agreed to do, and the arbitrator's award is precisely what they bargained for. Had the parties "anticipated additional regulation of their relationships pending arbitration, it seems very doubtful that they would have resorted to litigation rather than to private arrangements." *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). Judicial intervention prior to the arbitrator's decision would thus disrupt normal labor-maangement relations. It would also prejudice the arbitrator's decision. *Id.*, at 412.

ness resolving those questions preliminarily or at all. Were they to do so, it could "embroil the district courts in massive preliminary injunction litigation". *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 411 n.12 (1976). See *United Mine Wkrs. v. Rochester & Pitts. Coal Co.,* 416 F.Supp. 74, 77-78 (W.D. Pa. 1976). That would necessarily intrude courts into "a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets,* but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator. . . ." *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 410-11. This a court cannot do. *Id.,* at 410-12; see *Note, The Supreme Court, 1975 Term,* 90 HARV. L. REV. 252-55 (1976). Accordingly, the rule of law adopted by the Ninth Circuit was plainly right; Greyhound could not be enjoined, pending arbitration, from making the disputed change in the work cycle absent a promise to refrain from that action pending arbitration.

As to the facts, Greyhound did not promise to maintain the status quo pending arbitration. It did not do so expressly. It did not do so by implication, either. The only basis from which to imply such a promise is the arbitration provisions of the contract. The only promise which can be implied from them is a promise not to engage in economic warfare—*i.e.,* a lockout—which would deprive the other party of the benefit of his bargain to have the dispute arbitrated. Greyhound's action here would not and did not have that effect because it would not and did not interfere with or frustrate the Agreement's arbitration provisions; it

left them "unaffected". (Pet., App. D, p. xxx; see Part I, above.)*

Here the Union was not deprived of its bargain. It bargained for arbitration, not a maintenance of the status quo pending arbitration. The Union got that arbitration; the arbitrator ruled against it; and the disputed change in the work cycle has been put into effect. The Union bargained for no more and was entitled to no more. Therefore an injunction restraining Greyhound from taking action pending arbitration would give the Union relief to which it was not entitled to protect a right it never had and for which it never bargained. Moreover, unless the injunction bond were conditioned to be payable upon the Union's losing before the arbitrator, it would give that relief without requiring the Union to compensate the employer for the injury caused by being prevented from taking action it had a perfect right to take.** Worse still, the issuance of such a preliminary injunction would necessarily intrude the district court into the merits of an arbitrable labor dispute. The Ninth Circuit correctly reversed the district court's judgment, which did all those impermissible things.

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*The Union also argues that a labor contract includes general labor law principles as implied terms. (Pet., pp. 27-28) That may be so, but it is of no help to the Union. The labor law principle the Union wants implied in this Agreement does not exist, and is in fact contrary to the basic labor law principles that do exist.

**If this injunction were proper, the bond should have been conditioned to be payable upon the Union's losing before the arbitrator. It is not right to permit the Union to come into court; prevent the employer from taking an action the arbitrator rules the employer had the right to take all along; and then leave the employer holding the bag, with no compensation for being deprived of its rights.

CONCLUSION

The Petition should be denied.

Dated: July 28, 1977.

Respectfully submitted,

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